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In the
Supreme Court of the United States
October Term, 1958

No. 38

**RAILWAY EXPRESS AGENCY,
INCORPORATED,**

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of Virginia in this case is officially reported in Volume 199 of the Virginia Reports at page 589, and is also reported in Volume 100 of the Southeastern Reporter, 2nd Series, page 263. The opinion of the State Corporation Commission of Virginia has not yet been officially reported, but the text of the

opinion is printed commencing on page 43 of the printed transcript of record.

GROUND OF JURISDICTION

The Appellant challenges the validity of Sections 58-546 and 58-547 of the Code of Virginia, 1950, as amended, alleging them to be repugnant to the Commerce Clause of the Federal Constitution, and further seeks to challenge the amount of the tax as repugnant to the Fourteenth Amendment. The appeal is pursuant to Section 1257(2) of Title 28 of the United States Code.

QUESTIONS PRESENTED

By this appeal the following questions are presented:

- (1) Is the tax involved a property tax measured by apportioned gross receipts and levied in lieu of taxes upon other property?
- (2) Are the Appellant's Virginia activities such as would justify the tax regardless of its nature?
- (3) Having failed or refused to report its earnings attributable to Virginia, can the Appellant, in this Court, contest the amount of the State's assessment made on the best and most reliable information available?
- (4) Having failed to produce evidence in the State tribunals to support its claim that the tax is excessive, can the Appellant be heard to complain in this Court?
- (5) If the Appellant is to be heard in this Court on the amount of the tax the further question occurs, is the tax excessive?

STATEMENT OF THE CASE

A.

Preliminary Statement

The case is an appeal from the judgment of the Supreme Court of Appeals of Virginia affirming an order of the State Corporation Commission entered March 1, 1957, which order denied to the Appellant refund of certain taxes for the year 1956. The tax in question was assessed by the State Corporation Commission under the provisions of Article 4 of Chapter 12 of Title 58 of the Code of Virginia, 1950, as amended.

B.

The Case

The Appellee believes that the Statement of the Case included in Appellant's brief requires amplification in some respects.

By way of amplification, it is important to note that the evidence in this case reveals without contradiction that, even though the Appellant may not be *directly* engaged in intrastate commerce in Virginia, *the property owned by it in Virginia is used in intrastate commerce in Virginia, and for that use the Appellant receives valuable consideration*. Further, it appears that the Appellant has a contract with the Virginia Company, under the terms of which the Virginia Company is required to conduct the intrastate express transportation business in Virginia on the lines of fifteen (15) railroads, one (1) electric line, one (1) boat line and by motor vehicle as designated by Appellant, and the *Virginia Company is obligated to perform the obligations of the Appellant imposed by contracts between the Appellant and*

such carriers concerning intrastate operations in Virginia. The contract further provides that the Appellant *shall furnish to the Virginia Company, or permit the use jointly with it by the Virginia Company, of such property, real and personal, as may be necessary in the conduct of business transacted by the Virginia Company.* The employees of the two companies are considered joint employees whenever necessary for the conduct of the business of the parties in Virginia. *All revenue received by the Virginia Company is required to be transmitted to the Appellant.*

It is true that there appears in the Record a stipulation entered into prior to the hearing before the State Corporation Commission. It is to the effect that the Appellant conducts only an interstate business in Virginia.

However, it should be noted that the Appellant's evidence before the Commission reveals that the Appellant has contracts with railroad companies giving it "exclusive express privileges", that the Appellant has in turn contracted with Railway Express Agency, Incorporated, of Virginia, and under terms of the contract has, in effect, assigned to the Virginia Company its intrastate privileges in Virginia. The two companies use the same facilities, the same equipment, the same supplies, even the same bills of lading. The employees are "joint employees", and the Virginia Company transmits to the Delaware Company all its receipts. The Delaware Company pays or bears all costs or expenses, including all operating expenses of the Virginia Company. In other words, the Appellant totally owns the Virginia Company, receives all its revenues and pays all its bills, and permits the Virginia Company to use the Appellant's property in Virginia in intrastate commerce.

The stipulation does not alter the fact that *property* owned by the Appellant is used in intrastate commerce in Virginia.

Appellant states at page 7 of its brief that the "Virginia Company has paid all taxes (privilege and property) assessed against it since 1932, and there is no question here concerning *any* tax levied against that company" (R. 16, 92)". This fact seems immaterial to a decision here but the evidence offered on this point, as to years other than 1956, was rejected by the State Corporation Commission (R. 21) and its action in so rejecting was sustained by the highest State Court (199 Va. 589 at page 603).

Following the decision of this Court on the prior appeal between the parties the "license" tax provided for under the statutes then in force was not again assessed against the Appellant. In 1956 the General Assembly of Virginia "amended and re-enacted" the statutes affected. The amendments were substantial.

At page 8 of its brief Appellant discusses these amendments to the taxing statute and states "The taxes are identical in all material respects." It says further "The two taxes differ only in that (i) they have different names, (ii) the 'franchise tax' is *in lieu* of, rather than in addition to, certain other state property taxes, and (iii) the 'franchise tax' is not *expressly stated* to be for the privilege of doing business in Virginia." We assert that the two taxes differ in other respects and that the "difference" lettered (ii) by the Appellant is incorrectly described.

A comparison of the material statutes in force in Virginia at the time of the prior appeal (see Appendix B of Brief for the Appellant) and the currently existing statutes (see Appendix A of Brief for the Appellant) will immediately reveal two additional significant changes, both of which are material to a consideration of this case because of contentions made by the Appellant in its brief.

The first of these changes is the fact that under Section

58-546 of the prior statutes there were levied against express companies:

(1) State tax on intangible personal property at the rate of 50¢ on every \$100.00; and

(2) A state tax on money at the rate of 20¢ on every \$100.00.

Under Section 58-546 of the present statutes, the franchise tax is expressly declared to be "in lieu of taxes upon all of its other intangible property". Thus, these two specific taxes were removed by the amendments. The Appellant avoids specific reference to this in enumerating the differences in the two laws and, more importantly, makes a lengthy argument as to the amount of the tax using "Virginia's intangible personal property rate of 50¢ for each \$100.00 of value" as a part of its formula for computations. The Court followed that line of reasoning in its opinion in the prior case for then there was such a rate applicable to express companies. Under the existing statutes there is no 50¢ per \$100.00 of value rate on the intangible property of express companies, and the Appellant's whole argument predicated thereon is, therefore, predicated on a false premise.

The second major change which the Appellant fails to designate as such appears in the provisions of Section 58-547 of the respective laws. Under the existing statutes the Appellant is called upon to report the amount of its gross receipts derived from operations within the State. Under the prior statutes such receipts were presumptively determined by a formula based on proportion between mileage in Virginia and total system mileage. The formula was removed from the statute and was only applied in this case because the Appellant failed to properly report its gross receipts in Virginia (R. 38) and, in fact, said that it had

"none" and that it "had no way of determining" such receipts. The formula was applied administratively under Section 58-549 as being "the best and most reliable information that it (the Corporation Commission) can procure."

The difference lettered (ii) by the Appellant is far more significant than a reading of the Appellant's description thereof would lead one to believe. In effect, the Appellant says the new "franchise tax" is in lieu of certain *other* state property taxes, whereas the old "license tax" was in addition to certain *other* state property taxes. But, that is incorrect. This Court expressly held the old "license tax" to be a tax in addition to property taxes and not in addition to *other* property taxes. That was one of the "trinity of characterizations" which the Court found so important on the prior appeal. This change, which the Appellant deems so unimportant, is a change in the entire character of the tax.

In making its argument with respect to the "in lieu" provisions of the tax, the Appellant has done so on the basis that its only rolling stock consisted of refrigerator cars with a Virginia value of \$17,102.00 (see Appellant's Brief, pages 10, 22 and 26). However, the Appellant also owned automotive equipment and trucks in Virginia valued at \$262,719.00, which both the State Corporation Commission and the Supreme Court of Appeals of Virginia held to be "rolling stock" under the amendments to Section 58-546. Thus, we see still another "difference" in the statutes.

OUTLINE OF ARGUMENT

Part I

The amended statutes clearly levy a property tax. The tax is said to be "a franchise tax which shall be in lieu of taxes upon all its other intangible property and in lieu of property taxes on its rolling stock." The "trinity of char-

acterizations" so important in the prior appeal has been removed. Properly apportioned gross receipts may be used as a measure of the going concern value of the property within a state. This is especially true when, as is the case here, the property is used in *intrastate commerce* under a contract with a wholly owned subsidiary and the owner of the property receives all of the revenue from such use.

The Constitution of Virginia clearly reveals that its framers intended taxes such as the one at bar to be property taxes on going concern value. The taxing statutes are so administered that no other tax reaches going concern value. The prior decisions of the Supreme Court of Appeals of Virginia, some antedating *Spector Motor Service, Inc. v. O'Connor*, are uniformly to the effect that such taxes are property taxes. The tax is clearly not a license tax in operational effect, it is not made a condition precedent to the right to do business, it is a part of a system for taxing all of the property of a corporation in the State, it is fairly apportioned to Virginia mileage, and it is in lieu of taxes on other property.

Part II

Having failed or refused to report in Virginia its receipts attributable to mileage in Virginia, the Appellant should not be heard to contend that the State acted improperly in using the "best and most reliable information" available in arriving at the proper tax base. The mileage formula was invoked only because Appellant failed to properly report. No evidence was produced in the State Court to support a claim that the amount of tax is excessive, and if the action of the Commission in determining the tax base on the best available information has produced an incorrect result, the Appellant cannot complain in view of its failure to adduce any information as to its receipts in Virginia. The contracts

which Appellant has with the Virginia Company and various carriers are valuable property in lieu of which taxes on gross receipts may be levied. The tax is not excessive, and the statistics used by Appellant are misleading because it assumes a false tax rate and excludes any value for the contract rights.

Part III

The Appellant has contractual obligations with various carriers under which it is obligated to perform *intrastate* services in Virginia. It meets these obligations through the Virginia Company, its wholly owned subsidiary. It permits the Virginia Company to use the Appellant's property for its intrastate operations, and it in turn uses the Virginia Company's property interstate. The Appellant receives all receipt of the Virginia Company. These activities in the State subject Appellant to both property and privilege taxes in the State and, therefore, should the Court determine the present tax to be a privilege tax it is justified under the peculiar facts of this case.

ARGUMENT

I.

Section 58-546 of the Code of Virginia, 1950, as Amended, Imposes a Property Tax in Lieu of Taxes Upon All Other Intangible Property and in Lieu of Taxes on Rolling Stock.

A.

THE AMENDED STATUTE

The language of the taxing statute is so brief and concise that it seems appropriate to set it forth at this point.

"§ 58-546. Franchise tax on express companies.— Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock."

This Court, in April, 1954, in a decision on which the Court was divided 5-4 held that the Virginia statute then in force was "in fact and effect just what the Legislature said it was—a privilege tax, * * *."

In reaching its decision, the majority of the Court said:

"We start with the taxing statute in which the Legislature gave a trinity of characterizations to the tax. It was declared to be in addition to the 'property tax', not an additional property tax; it was named 'an annual license tax', and it was laid 'for the privilege of doing business in this State.' It is not an easy conclusion that the Legislature did not know the actual character of the tax it was laying or that it misconceived what it was taxing." (347 U. S. 364)

In conclusion, the Court said:

"We think we can only regard this tax as being in fact and effect just what the Legislature said it was—a privilege tax, and one that cannot be applied to an exclusively interstate business." (347 U. S. 369)

In the dissenting opinion, it was made clear that the majority had based their decision mainly, if not solely, on the labels which the Virginia Legislature had applied. There it is said:

"In sum, Virginia's tax should not be held unconstitutional merely because of the name the state's legis-

lature gave it. Since no one asserts that the amount of the tax is unfair or discriminatory, presumably the same tax assessed under a different name by the use of different words would be upheld. The constitutionality of a state's tax laws should not depend on the ability of state legislatures to foresee what tax language would most likely meet this Court's approval." (347 U. S. 372)

The State had urged, in brief and in argument, that the tax was a property tax; that decisions of the Virginia Court, some antedating *Spector Motor Co. v. O'Connor*, 340 U. S. 602, 95 L. Ed. 573, 71 S. Ct. 508, had held similar taxes on railroads and steamships to be taxes on the "going concern value" and hence property and not privilege taxes; that the intention of the framers of the Virginia Constitution of 1902, as evidenced by the debates and the language of the document itself, was consistent with a determination that the tax was a property tax; and, finally that, as measured by the criteria established in the decisions of this Court, the operation of the statute was consistent with such a determination. In spite of these arguments, the Court was unwilling to conclude that the Virginia Legislature had "misconceived what it was taxing." At its first session following the decision in the prior appeal, the General Assembly of Virginia gave consideration to this Court's decision. It is apparent from the action of the Legislature that it recognized that the language used by it in the prior act had not, under this Court's interpretation, resulted in the tax which the Legislature had intended—to-wit: a property tax on the going concern value of express companies as authorized by Section 170 of the State Constitution. The Legislature, still endeavoring, as it has consistently, to levy a tax on the going concern value of the express companies, amended the taxing statute in an effort:

(1) To make clear its intention to tax property, not privilege;

(2) To measure the tax by fairly apportioned gross receipts and make it in lieu of *other* property taxes; and

(3) To make it plain that the tax was not for the privilege of doing business.

Naturally, the tax looks somewhat like its predecessor. This is true because the Legislature has never changed its objective. It tried before to levy a property tax consistent with the State system of taxation under the State Constitution, and consistent with decisions of this Court dealing with the applicable provisions of the Federal Constitution. This Court, however, pointed to a "trinity of characterizations" which led the Court to conclude that, in fact, the Legislature had levied a privilege tax, and the Court held that under the language of the statutes they were invalid. Consistent with that determination, Virginia assessed no such taxes against the Appellant in 1954 or 1955. The Legislature, confronted with the fact that the existing license tax for the privilege of doing business had been nullified as to this company, amended the taxing statute and imposed a franchise tax on all express companies doing business in the State *in lieu of taxes upon all their other* intangible property, and in lieu of property taxes on their rolling stock. The tax was not called, and does not operate as, a license tax. The incidence of the tax is intangible property including the increased value of the Appellant's property as a going concern. The tax is not said to be, and does not operate as, a tax for the privilege of doing business in Virginia.

In an obvious attempt to clarify the intent of the Legislature "the trinity of characterizations" was removed:

1. The First of the "Trinity"

The amended tax was declared to be "in lieu of taxes upon all of its *other* intangible property and in lieu of property taxes on its rolling stock" (Emphasis supplied). This Court found significance in the fact that the former tax was "in addition to the property tax, not an additional property tax". By the same kind of reasoning the word "other" in the amended statute clearly points to this tax as being one on a particular type of intangible property.

As we have previously mentioned, the Appellant, in its brief, twice overlooks the significance of this change. At page 15, it says:

"The second change is that the tax is now levied 'in lieu of', rather than 'in addition to', certain other property taxes."

In stating the case on page 8, the Appellant says:

"The two taxes differ only in that * * * (ii) the 'franchise tax' is *in lieu of*, rather than in addition to, certain other state property taxes."

In both these statements, the Appellant speaks as though the prior statute levied a license tax in addition to *other* property taxes, or was, in other words, an additional property tax. But, that is exactly what this Court said was not true. Great significance was laid by the Court on the fact that it was not an *additional* property tax. Thus, both of the quoted statements of the Appellant miss the entire point of the amendment. Small wonder it considers it the same tax.

2. The Second of the "Trinity"

While the tax under the former statute had never operated as a license tax, the term "license tax" was removed.

3. The Third of the "Trinity"

Under the former statute, payment of the tax was not a condition precedent to the right to do business, that is likewise true of the amended statute, but in the amended statute the phrase "for the privilege of doing business in this State" has been removed.

The Appellant argued before the Supreme Court of Appeals of Virginia that the tax imposed by the amendments to the Virginia statutes " * * * is the same tax, but under another name, which was held invalid * * *." In reply to this, the Virginia Court said:

"In the present case we are dealing with statutes different from those before the Supreme Court in the former *Railway Express Agency* case. Present § 58-546 imposes only 'a franchise tax which shall be in lieu of taxes upon all of its *other* intangible property and in lieu of property taxes on its rolling stock' (emphasis added). Section 58-547 provides that this franchise tax shall be equal to 2.15% of gross receipts derived from operations in this State. Section 58-551 permits the locality to impose a tax on real estate and tangible personal property other than rolling stock on the basis of the assessment thereof made by the Commission for that purpose and at the same rate as imposed by the locality on the same kind of property. Section 58-553 provides that the taxes so imposed and authorized shall be in lieu of all other taxes and of all licenses on such companies, except the motor vehicle license or fuel tax prescribed by law or the annual registration fee.

"As we pointed out in the *Steamship* cases, *supra*, our constitutional and statutory provisions furnish a uniform plan for the assessment and taxation of all public service corporations, providing for the imposition by local authorities of *ad valorem* taxes on tangible property on the basis of valuation fixed by the State Corporation Commission, and the imposition of a franchise tax measured by gross receipts for the support of the State government; and that in making the assessments of the tangible property for local taxation, the Commission must *exclude* such franchise value as may be inherent therein, with the result that only the 'bare bones' value of such property is taxed by the localities, leaving the intangible or 'going concern' value to be taxed by the State for the protection and services rendered by it. The statutes now under consideration fit into and 'mesh' with that scheme, and make plain, we think, the legislative intent, in keeping with the constitutional intent from which the legislation proceeded, that the franchise tax now imposed is in fact and effect a tax on intangible property of the company, of great value, which except for this franchise tax would be immune from the payment of any tax." (199 Va. 596)

In the case of *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 62 L. Ed. 827, this court discussed two earlier cases. Both of those cases had been decided on the same day. Consideration of the distinction drawn between the two cases is of tremendous value in weighing the effect of the amendments to the Virginia statutes. There it was said:

"* * * A short reference to two recent cases in which the earlier decisions were reviewed will leave little to be said in solving the question here. We refer to *Meyer v. Wells, F. & Co.*, 223 U. S. 298, 56 L. Ed. 445, 33 Sup. Ct. Rep. 218, and *United States Exp. Co. v. Minnesota*, 223 U. S. 335, 56 L. Ed. 459, 32 Sup. Ct. Rep.

211, both decided on the same day. The former involved a tax in Oklahoma of a stated per cent of the gross receipts of an express company doing both a local and an interstate business in that state. The statute called the tax a 'gross revenue tax,' and declared that it was to be 'in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets' of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax, because, as the statute disclosed, all the property of the company in the state was to be reached and valued in another way. The other case involved a tax in Minnesota of a designated per cent of the gross earnings of an express company from business done in that state, the business being partly local and partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the state as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the state." (246 U. S. 454, 455)

B.

PROPERLY APPORTIONED GROSS RECEIPTS MAY BE MADE THE MEASURE OF GOING CONCERN VALUE

The Appellant says that the determining factor in this Court's decision in the prior appeal is the principle that a direct tax on gross receipts does not measure property values, and, therefore, is not a property tax. For this principle the case of *United States Glue Company v. Oak Creek*, 247 U. S. 321, is cited. That case was decided in 1918 and has been referred to in numerous decisions since that date. The case has not been generally cited, however, as authority for the proposition that a properly apportioned gross receipts tax in lieu of other property taxes is unconstitutional. However, on the prior appeal this Court made reference to the case in connection with the statement " * * * we have declined to regard mere gross receipts as a sound measure of going concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume" (347 U. S. 367).

The Court cited no other authority for the proposition, and the Appellee respectfully submits that the *Glue Company* case is not such authority.

The issue before the Court in the *Glue Company* case was the validity of a net income tax, not a gross receipts tax. Concerning the *Glue Company* case, Mr. Justice Black, in a dissenting opinion in *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 83 L. Ed. 272, had this to say:

"It was not until the decisions in the cases of *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 296, 62 L. Ed. 295, 298, 38 S. Ct. 126; and *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, 62 L. Ed. 1135, 1141, 38 S. Ct. 499, Ann. Cas. 1918E, 748, decided in 1917

and 1918 respectively, that this court first tentatively announced, *by way of dicta* a rule condemning State taxes based on gross receipts from interstate commerce." (Emphasis added)

"The full blown rule under which the Federal Courts strike down generally applied non-discriminatory State taxes measured by gross receipts from interstate commerce ripened into its present expanded form only eight months ago. (*J. D. Adams Mfg. Co. v. Storen*, May 16, 1938. (304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, 117 A. L. R. 429.)) This recent judicial restriction—still less than a year old—on the power of the states to levy general gross receipts taxes, cannot be justified or validated by claiming prestige from advanced age."

Even the "expanded rule" of the *Adams* case referred to by Justice Black is not broad enough to invalidate the tax in the statute here involved, for in the *Adams* case the Court, speaking through Mr. Justice Roberts, said "The vice of the statute * * * is that the tax includes in its measure, *without apportionment*, receipts derived from activities in interstate commerce; * * *." "Interstate commerce would thus be subject to the risk of a double tax burden to which intrastate commerce is not exposed * * *" (304 U. S. 311, 82 L. Ed. 1369).

The burden of this portion of the Appellant's argument is that a direct tax on gross receipts does not measure property values and, therefore, simply is not a property tax.

Appellant has also cited *Southern Railway Company v. Kentucky*, 274 U. S. 76, for this proposition, and it is clearly not in point.

Even the decision in the prior appeal between the parties herein is not authority for the proposition. If, in fact, the court had ruled, on the prior appeal, that every tax on a business engaged solely in interstate commerce and meas-

ured by gross receipts is void, its opinion would, we submit, have been much different. The prior taxing statute was held unconstitutional as applied to the Appellant, not because it was a gross receipts tax, but because the Court said it was a privilege tax. The Court used the fact that the tax was measured by gross receipts as *one* of the indications that it was a privilege tax, but, as has already been noted, there were numerous other indications. The Court did not say "the fact that its measure is gross receipts invalidates the tax." Instead, the Court said "the fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, *just as the Legislature indicated.*" (Emphasis added) The ultimate effect of the Appellant's argument is that every tax measured by gross receipts, whether apportioned or not, is a privilege tax, and hence, as applied to one engaged solely in interstate commerce, void. The Court has not so held; indeed, this Court has repeatedly expressed itself to the contrary.

In *Western Live Stock v. Bureau of Internal Revenue*, 303 U. S. 250 (1938), this Court, speaking through Mr. Justice Stone, said:

"* * * Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 24 S. Ct. 107, 48 L. Ed. 229; *Maine v. Grand Trunk Railway*, *supra*; *Cudahy Packing Co. v. Minnesota*, *supra*; *United States Express Co. v. Minnesota*, 223 U. S. 335, 32 S. Ct. 211, 56 L. Ed. 459, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair, *Fargo v. Michigan*, *supra*; *Galveston, H. & S. A. R. Co. v. Texas*, *supra*; *Meyer v. Wells, Fargo & Co.*, *supra*,

with which compare *Wisconsin & M. R. Co. v. Powers*, supra. Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in *Maine v. Grand Trunk Railway*, supra; *Ficklen v. Shelby County Taxing District*, supra; *American Manufacturing Company v. St. Louis*, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084, or as a method of arriving at the fair measure of a tax substituted for local property taxes, *Cudahy Packing Co. v. Minnesota*, supra; *United States Express Company v. Minnesota*, supra; cf. *Postal Telegraph Cable Co. v. Adams*, supra; see *McHenry v. Alford*, 168 U. S. 651, 670, 671, 18 S. Ct. 242, 42 L. Ed. 614, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. * * *

(303 U. S. 256)

As recently as the case of *Interstate Oil Pipe Line Company v. Stone*, 337 U. S. 662 (1949), this Court has approved the doctrine of *Maine v. Grand Trunk R. Co.*, 142 U. S. 217 (1891), which sustained a tax on an interstate railroad corporation which was "an annual excise tax measured by apportioned gross receipts for the privilege of exercising its franchises in this State" (337 U. S. 667); and while there may be disagreement as to whether the tax in the *Grand Trunk* case was sustained on the ground that it was imposed in lieu of *ad valorem* taxes as Mr. Justice Holmes explained in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. Ed. 1031, we have never seen any case in which it has been suggested that such holding would have been contrary to any decision of this Court. But, the Appellant's argument would mean that the tax in the *Grand Trunk* case was incapable of such interpretation because it was measured by gross receipts.

In its brief before the State Court, the Appellant asserted that *Western Live Stock* is not pertinent to the argument we make here because it involved a privilege tax, not a property tax. We cited the language of the Court in that case as the Court's understanding of its prior rulings. Appellant has cited no case in which the Court has said "A tax which has as its measure gross receipts is a privilege tax and can never be a property tax." That is what the Appellant asserts, but Mr. Justice Stone, speaking for the Court, in *Western Live Stock* thought differently:

"Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this Court has ~~held~~ that local taxes may be laid on *property used in the commerce*; that its value for taxation may include the augmentation attributable to the commerce in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former." (303 U. S. 259, 82 L. Ed. 830) (Emphasis added)

We reserve for full discussion later the fact that by means of the Virginia Company the Appellant indirectly conducts an intrastate business in Virginia, but we point out here, in connection with the quoted statement from *Western Live Stock*, that the evidence is uncontradicted that *THE APPELLANT'S PROPERTY AND ITS EMPLOYEES ARE ENGAGED IN INTRASTATE COMMERCE* by the Virginia Company, which is wholly *owned and controlled* by the Appellant, and that the Appellant receives valuable consideration for permitting its property to be thus engaged in intrastate commerce.

In the *Cudahy Packing Co.* case, *supra*, the statute involved required the company "to report annually its gross

earnings from the operation of its car line within the State, and to pay, in lieu of other taxes on the property so employed, a tax fixed at a stated per cent of such earnings" (246 U. S. 452). Although the earnings thus reached were "derived largely from interstate commerce" this Court held the tax to be a property tax.

We do not understand the law to have changed.

C.

INTERPRETATION OF THE VIRGINIA STATUTE IN THE LIGHT OF THE STATE CONSTITUTION

The Appellee recognizes the power of this Court to examine for itself the nature and effect of the tax here involved. In doing so, however, this Court should look at the tax in conjunction with the State's "scheme of taxation".

As to the State's system of taxation, the Supreme Court of Appeals of Virginia had this to say:

"As stated by the Commission in its opinion, it has been the policy of Virginia since the adoption of its present Constitution in 1902 to impose franchise taxes measured by gross receipts instead of income taxes on public utilities. The Constitution itself (§ 177) imposed the tax on railroads and the tax on other companies was left to the legislature. When the proposed system was submitted to the Convention which formulated the Constitution, its Committee on Taxation and Finance reported in part:

" * * * The system which we hope to see adopted in this State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at; * * *. * * * If that be done, if you get at all of the property, its personal property and its real estate, its tangible,

invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of the individual owner. * * * Debates, Constitutional Convention, 1901-2, Vol. II, p. 2857.

"Consonant with the Committee's purpose, §170 of the Constitution adopted by the Convention provides that the General Assembly 'may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property'. (Emphasis added.)" (199 Va. 597)

The Committee on Taxation and Finance went further, and it is clear, from the statement of the spokesman for the Committee, that they considered a tax measured by gross receipts to be the only proper way of reaching the property value inherent in a going concern. He said:

"As I have said, we looked around to see if we could find a principle that would do justice, and in looking around we found that *as we could not find out the material value of this property, like you find out the value of a house, we would provide for some method of estimating it, and we would leave it to the State authorities to exercise it.*

* * *

"I repeat that you cannot get at the value of this property like you can get at the value of my real estate. There is but one way of looking at my real estate, and that is to see what its market value is. *But you cannot ascertain the market value of a railroad bed. We could*

not apply, therefore, the principle that you would apply to the ordinary classes of property owned by individuals." (Italics supplied) (Debate of the Constitutional Convention of Virginia, 1901-2, II, p. 2677)

In the State court, Appellant seriously contended that Section 170 of the Virginia Constitution did not authorize the imposition against it of the tax here involved. The Court decided adversely to that contention. The language of Section 170 standing alone would seem to compel the conclusion that a "franchise tax" imposed under it is a property tax in lieu of taxes upon other property.* The pertinent portion of the section is as follows:

"The General Assembly * * * may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial or commercial corporation."

The use of the word "other" in the Constitution is one compelling "characterization" of a tax imposed thereunder as a property tax.

Appellee has consistently maintained throughout this litigation that this section is pertinent in determining the incidence of the tax levied by the Legislature. When it is considered in the light of the fact that the prior tax was ruled unconstitutional because it was a "privilege" tax, it becomes doubly significant and it is absurd to conclude that the new tax is anything other than an effective effort on the part of the Legislature to utilize the power given it under this section of the Constitution.

* For full text of Section 170 of the Constitution of Virginia, see Appendix.

Indeed, counsel for the Appellant admitted before the State Corporation Commission that such was the intent of the Legislature when he said:

"No, I think the Legislature meant to do what it was saying, that is, invoke the Constitution. Under the Constitution it may impose a franchise tax and make it in lieu of taxes on other property." (R. p. 21).

At the time of the prior appeal, the Appellant argued, on page 28 of its brief, that it was the legislative intent to levy "a *privilege* rather than a *property* tax."

D.

INTERPRETATION OF THE VIRGINIA STATUTE IN THE LIGHT OF THE STATE'S ADMINISTRATIVE INTERPRETATION

The Supreme Court of Appeals of Virginia pointed out in the paragraph of its opinion quoted under Section A herein that in assessing the tangible property of a public service corporation the Commission is required to exclude "going concern value", and tax only the "bare bones" (*supra*, p. 15).

Even under the prior tax, which was held to be a privilege tax, the law of Virginia has been administered in that manner. This will be revealed in Section E hereof in quotations from earlier cases in Virginia, but the 1941 Annual Report of the State Corporation Commission contained the following paragraph, which leaves no question as to the thinking of the administrative body itself:

"Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded

of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%.' " (193 Va. 70)

E.

PRIOR DECISION IN VIRGINIA

In the dissenting opinion written by Mr. Justice Clark on the prior appeal, it is recognized that the expressions of the State Court, and those of the State Corporation Commission, on this subject were perfectly consistent with the determination that the tax was a property tax. It was noted that some of the decisions antedate *Spector Motor Service, Inc. v. O'Connor, supra*.

It seems hardly necessary to do more than set forth here statements from two such earlier decisions.

In *City of Richmond v. Commonwealth*, 188 Va. 600, 50 S. E. 2d 654, decided in 1948, the opinion of Court made it clear that the system of taxation existing in Virginia envisioned a tax on "going concern value" measured by gross receipts, and that such value was not subject to dual taxation. The Court explained the operation of the tax by quoting from the views of two former State Corporation Commissioners.

" * * * It will be noted that in assessing these properties the Commission is expressly forbidden by the Constitution to include any franchise value in the assessment of the physical properties for taxation. * * * " (188 Va. 632)

* * *

" The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical prop-

erties of the railroad company *exclusive of any franchise value, good will, "going concern value," "cost of establishing the business," or other "intangible value of the company."* (Italics supplied) (188 Va. 624)

"* * * In brief, the plan existing today, which is common to all such companies, provides for the imposition of *ad valorem* taxes by the several localities in the State upon the tangible properties of such companies. These taxes are imposed on the basis of assessments made or valuations fixed by the Commission. A second and integral part of the system provides that such companies shall pay a franchise tax measured by gross receipts which tax is devoted to the support of the State government. The constitutional and statutory provisions, providing for this dual method of taxing such companies, uniformly require that the Commission, in making the assessments or fixing the valuations of the tangible properties, must *exclude* such franchise value as may be inherent in such property.'" (188 Va. 619)

The case of *Commonwealth v. Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. 2d 137, was so clearly analogous to the prior appeal between the parties here that the Appellant here filed a brief *amicus curiae*.

In that case, after reviewing the principles laid down by this Court with respect to such taxes, the Virginia Court considered the question of whether that tax (and, since the Appellant was before the Court *amicus curiae* the Court also expressly dealt with the tax on express companies) was a license tax and concluded:

"Certainly section 58-575 does not impose a license tax in the sense that its payment is a prerequisite to the right to operate vessels in the navigable waters of the United States. It does not impose a tax on the privilege of navigation. The payment of the tax is not made a condition precedent to the right to carry on the busi-

ness, as was the case in *Moran v. New Orleans*, 112 U. S. 69, 5 S. Ct. 38, 28 L. ed. 653, and *Harman v. Chicago*, 147 U. S. 396, 13 S. Ct. 306, 37 L. Ed. 216. It provides no criminal sanctions, but its enforcement is left to the ordinary means devised for the collection of taxes, *Postal Tel. Cable Co. v. Adams*, *supra*.

"Baltimore has been paying a tax on receipts from business 'beginning and ending in Virginia' every year since 1915, but no license has ever been issued to it and the procedures prescribed in Article I, Chapter 7 of Title 58 for obtaining licenses have not been followed. 'But where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax.' *Charlottesville v. Marks' Shows*, *supra*, 179 Va. at p. 329, 18 S. E. (2d) at p. 894.

"If not a license tax, is it a tax on property or the equivalent of a tax on property?" (193 Va. 68)

Turning its attention to its own question, the Court said:

"In *Richmond v. Commonwealth*, 188 Va. 600, 619, 50 S. E. (2d) 654, 663, the opinion of the State Corporation Commission in that case is quoted to the effect that our constitutional and statutory provisions furnish a uniform plan for the assessment and taxation of public service corporations, common to all such companies, and providing for the imposition of *ad valorem* taxes by the several localities in the State, on the basis of assessments or valuations fixed by the Commission. 'A second and integral part of the system provides that such companies shall pay a franchise tax measured by gross receipts which tax is devoted to the support of the State government. The constitutional and statutory provisions, providing for this dual method of taxing such companies, uniformly require that the Commission, in making the assessments or fixing the valuations of the tangible properties, must *exclude* such franchise value as may be inherent in such property.'

"We said in that opinion that the existing method of assessing the properties of the utility involved in that case was developed from the system prescribed for the assessment of railroad properties, and we quoted from a letter relating to railroad assessments written by Commissioner Epes, afterwards a justice of this court, saying in part:

"The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical properties of the railroad company exclusive of any franchise value, good will, 'going concern value,' 'cost of establishing the business,' or other 'intangible' value of the company."

"Likewise, in the 1941 Annual Report of the Commission, page 41, it was said:

"Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%."

"It thus appears that the physical properties of these appellees, according to this practice, were assessed on the basis of their dual values, the dead value, or 'the bare bones,' to be taxed by the locality, and the live, or going concern value, to be taxed by the State for the protection and services rendered by it. That the going concern value is thus taxable, although the basic items of property on which it arises are used in interstate commerce, is established by numerous decisions of the Supreme Court, as set out above. This tax on the going concern value is in effect an increase of the *ad valorem* rate, *Memphis Natural Gas Co. v.*

Stone, supra. In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed. It is, therefore, a tax which is not prohibited by the Commerce Clause." (193 Va. p. 69)

These decisions should make it clear that there is present no effort on the part of Virginia to merely avoid the adverse economic effects of the prior appeal by a change of language. Virginia has consistently sought to reach this intangible property. This Court said it failed before due largely to the choice of words. The words were changed (and we submit the legal effect necessarily changed also), but the objective of Virginia did not change. The objective was and is—a property tax, measured by gross receipts.

F.

THE OPERATION OF THE STATUTE

In determining whether this is a license tax or a property tax, it would seem that it would be helpful to examine the operation of the statute in the light of certain of the decisions of this Court.

The tax in question is not made a condition precedent to the right to carry on the business, but its enforcement is left to the ordinary means devised for the collection of taxes (see Section 58-554, at page 31 of Appellant's brief). The tax, therefore, meets the test of *Postal Tele. Cable Co. v. Adams*, 155 U. S. 688.

The important element of *Maine v. Grand Trunk Ry. Co.*, *supra*, as referred to in the *Galveston* case, *supra*, was:

"* * * the fact that the scheme of the statute was to establish a system. The buildings of the railroad and

its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. The idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. * * *." (210 U. S. 226)

The tax in question is a part of an identical system. Indeed, Appellant argued on the prior appeal that such taxes in Virginia copied that system.

The tax in the *Galveston* case was condemned because it was an attempt to reach receipts reached by another tax on the property that included going concern value, but in *United States Exp. Co. v. Minnesota*, 223 U. S. 335, 56 L. Ed. 459, this Court sustained the tax because it was "the only mode prescribed in Minnesota for exercising the recognized authority of the State to tax the property of express companies as going concerns within its jurisdiction."

The tax involved is the only tax in Virginia that reaches going concern value of *such property*.

Other taxes have been condemned because they permitted the possibility of a cumulative burden by the imposition of a similar tax on the same property by numerous states. But when, as here, the tax is "fairly apportioned to its use within the state" that vice is not present. *Western Live Stock, supra*.

There is absolutely no question but that this tax is substituted in lieu of taxes on all other intangible property and all rolling stock. Such taxes have been approved time and again, *Cudahy Packing Co. v. Minnesota, supra*.

In addition to these criteria there are two additional cir-

cumstances present in this case which the Court was not called upon to consider on the prior appeal:

(1) All of the property of the Appellant is used in intrastate commerce by the Virginia Company under a contract with that Company, and the Appellant is compensated for permitting such use of its property.

(2) The Appellant totally owns and controls the Virginia Company which is engaged in intrastate commerce and the property of the Virginia Company is used by the Appellant in interstate commerce.

II.

The Amount of the Tax

The Appellant contends that even if, contrary to its belief, the tax under attack is a property tax, it denies due process of law because of the "method of apportioning Appellant's gross revenues" and because it is no "just equivalent of the tax in lieu of which it was imposed."

These assertions are made against the "amount" in spite of the fact that Appellant failed or refused to report in Virginia the amount of its receipts earned from business passing through, into or out of the State. On its return where that information was requested the Appellant answered "NONE" and appended a statement to the effect that it had no way of making such determination. As a result of this report the State Corporation Commission of Virginia invoked the provisions of Section 58-549 of the Code of Virginia and proceeded to determine the tax based on the "best and most reliable information" available. This is an accepted tax practice in federal as well as state taxes. Its need seems obvious.

The taxpayer is thus in the position of saying "I kept no

records, I can't report, but your result is wrong."

It should be remembered that as a result of a change since the prior appeal the mileage formula was not a part of the statute, and was only invoked because the taxpayer failed to properly report.

The Commonwealth's position was aptly stated in the State Court's opinion:

"Section 58-547 does not undertake to prescribe the method of ascertaining the amount of these gross receipts. Sections 58-548 and 58-549 do that. The primary method is for the express company to report what these receipts are. Nobody else could as easily obtain that information. The secondary method is not needed unless the express company fails to furnish the information, which happened here. In that event the Commission is required to make the assessment on the best and most reliable information it can get. * * *

"* * * For years prior to 1954 the appellant reported to the Commission the amount of its gross receipts or agreed to the amount fixed by the Commission. For 1956 it reported, as stated, that it had no way of determining its gross receipts from interstate business in Virginia and that it kept no books from which it could ascertain such gross receipts and the cost of doing so would have been prohibitive, but without any supporting evidence to explain how much and why. The commission thereupon ascertained in the best way it could the amount of these gross receipts to be \$6,499,519. *If that was too much and if there was included in the calculation, as appellant contends, the value of property outside of Virginia, it was the duty of the appellant to present evidence to show what reduction should be made, or to have explored the possibility of an agreement about it as in prior years. (Railway Express Agency, Inc., v. Commonwealth, 194 Va. 757, 75 S. E. 2d 61.)*

"There is no evidence in the record as to the relation between the Company's property and its revenues in other States. Code § 58-672 and § 58-1122 provide ample means for correcting excessive assessments. Clearly the burden was on the appellant to produce evidence to show in what way and to what extent the assessment made by the Commission was too much. It did not do so but centered its attack on the constitutionality of the taxing statute. We take the finding of value by the Commission as prima facie correct, Constitution § 156 (f). It is not incredible that a property which produced gross earnings of \$6,000,000 in one year would have a value of that much." (Emphasis added) (199 Va. 589)

The failure of the Appellant to produce evidence in the State tribunals to support its claim is ample reason for this Court to refuse to review the question, particularly where, as here, adequate remedy for the correction of excessive assessment is available and has not been resorted to in the State Courts.

As the State Court noted, the Appellant has produced no evidence "as to the relation between the company's property and its revenues in other states." (199 Va. 601) In spite of this fact it now seeks to demonstrate mathematically that the tax is excessive.

Even if there were such evidence in the record, the fallacy of a statistical approach is immediately apparent. In Virginia, Appellant enjoys the joint use of property with the so-called Virginia Company. With regard to its property located in Virginia, by merely placing title to all its tangible personal property, office furniture, equipment and real estate in the Virginia Company—which it wholly owns and controls—the Appellant could realize the same earnings in Virginia and have an even smaller percentage of its total property Virginia owned. One big asset of the Appellant

is the Virginia Company. The joint use of trucks, buildings, employees, etc., makes it easy for Appellant to earn tremendous sum in Virginia without the ownership of tangible property.

The claim that 1.7% of its revenues was derived in Virginia the Appellant brands as "unrealistic", but the evidence showed that the total mileage covered by the Appellant by rail, steamboat, motor carrier or miscellaneous was 306,624, and that 6,118.90 miles of that is in Virginia. Over 1.9% of its total mileage is in Virginia. How can it be unrealistic to say that 1.7% of its revenue was derived in Virginia?—Express companies make money on the basis of the mileage involved, not on the basis of the value of the tangible property owned, and the contract right to move express over these 6,118.90 miles is valuable property, especially so when over most of the mileage the Appellant enjoys an absolute monopoly. Even the Appellant concedes this to be valuable property!

Appellant further sought to demonstrate mathematically that it had no property on which a tax could be levied in an amount sufficient to support this "in lieu" tax, and that the going concern value attributed to its properties is so disproportionate as to "over-tax our credulity". It does so by the simple device of assuming for purpose of computing going concern value a false tax rate of $\frac{1}{2}$ of 1% (50¢ on \$100.00 in value).

Where does Appellant find this tax rate of 50¢ on \$100.00 in value? It is not a part of the scheme of taxation applicable to express companies. This same illustration was used by Appellant and the Court on the prior appeal, but with some propriety, for at that time the intangible property of express companies was taxed at that rate. The statutes have been amended, and the rate selected by Appellant is merely an assumed rate. Why should we not assume a rate of \$5.00

per \$100.00 in value? If we assume such rate the property value necessary to produce tax of \$139,739.66 would be only \$2,794,793.20. Obviously, by *assuming* a tax rate we can arrive at any value we desire.

The statute calls for a tax "equal to two and three-twentieths per cent of the gross receipts." If we assume 2.15% (two and three-twentieths) or \$2.15 per \$100.00 in value to be the "rate", obviously the "value" required to produce the tax will be \$6,499,519. This is apparently the interpretation placed on the tax by the Virginia Court when it said "It is not incredible that a property which produced gross earnings of \$6,000,000 in *one* year would have a value of that amount." Certainly the statement is economically sound. The purchase of rental property for a price equal to one year's gross rent would be a sensational bargain! The Appellant asks the Court to *assume* the value prescribed is too great—it has not attempted to prove the fact with evidence.

No good purpose would be served of here arguing what even the Appellant apparently admits, to-wit: property used as a part of a going concern acquires an intangible property value over and above the value of the tangible property. The Appellant merely seeks to illustrate that it has so little tangible property that it cannot have such great intangible value. But a great part of the value of the Appellant's property comes about by virtue of contract rights of great value. These contract rights are intangible property.

Appellant has two such items of intangible personal property about which it has had little to say. It appears from the record that it owns a contract with the Virginia Company by which it has the privilege of using in Virginia that company's property and employees, and receive all its revenue. In fact, it owns all the stock in the Virginia Company. These are valuable properties. It also appears from the record that

the Appellant *owns* a contract which entitles it to the exclusive express privilege on 177 railroads in the United States and express privileges on a number of truck lines, air lines and steamboat lines. Many of them operate in Virginia. What is the value of this "intangible" property?

This we do not know. We do know that based on the proportion of Virginia mileage to system mileage the privilege on the six major railroads and five air lines, earned gross revenues in Virginia of \$6,499,519 in one year. The Legislature has concluded that only by determination of revenues can we reach the going concern value of such a corporation's property. We must assume that in fixing the rate of tax the Legislature was well aware that it was levying a tax to be measured by gross receipts rather than net income, and that it set the tax rate much lower than would have been the case if they had been basing the tax on net income.

The ownership by the Appellant of these exclusive contract rights with the Virginia Company and various carriers in Virginia could be made the subject of a contract tax in Virginia. However, Virginia in the exercise of its discretion has determined to impose a franchise tax measured by gross receipts "in lieu" of such a tax on this and other intangible property and on rolling stock. This action of the General Assembly has been found by the State Corporation Commission and the Supreme Court of Appeals of Virginia as being consistent with the intent and purpose of the State Constitution, and further both of these judicial bodies have found the operation of the tax inoffensive under the Constitution of the United States.

III.

The Appellant's Activities in Virginia

The Appellant's first argument is devoted to the point that

doing no intrastate business in Virginia it cannot be subjected to a privilege tax in Virginia. That was the rule of the prior appeal.

The evidence in this case reveals that the Appellant permits its property to be used in intrastate commerce in Virginia by its wholly owned subsidiary, and for that use it receives all of its subsidiary's receipts. In addition, it is clear that it, and its subsidiary, use the same facilities, the same equipment, the same supplies, even the same bills of lading. The employees are "joint employees". The Appellant pays or bears all costs or expenses including all operating expenses of the Virginia Company. In other words, the Appellant totally owns the Virginia Company, receives all its revenues and pays all its bills. Certainly, it is clear that the Virginia Company is merely a corporate shell admittedly created to satisfy Section 163 of the Constitution of Virginia. These facts were not considered by this Court in the prior case, and distinguish this case from the prior decision.

The Appellant has contracts with various carriers under which it is obligated to perform services *intrastate* in Virginia. Under its contract with the Virginia Company that company is required to "perform all of the obligations of the Delaware Company imposed by contracts between the latter company and such carriers concerning *intrastate* operations in Virginia." In performing these services, the Virginia Company is permitted to use the property of the Appellant — all revenue is transmitted to the Delaware Company.

The Commonwealth earnestly submits that this "unity of use" would justify a privilege tax against the Appellant. In making this suggestion the State should in no wise be considered as having indicated a desire or intention to levy such a tax. The State's scheme of taxation envisions a property tax in this situation. That is what the Legislature has

sought to levy. However, should this Court again conclude that it is in reality a privilege tax, we respectfully suggest that it is, on the peculiar facts of this case, clearly distinguishable from *Spector*.

That such a tax here would not be discriminatory, unfair or burdensome can be illustrated by the following example:

Two express shipments are made on the same day by the same shipper in Richmond. They are delivered to the same employee, who is the joint employee of both companies. One is destined for Bristol, Virginia, one for Bristol, Tennessee—just across the Virginia State line. The packages are handled by the same employees and transported in the same truck or railroad car. Obviously, they each receive the same protection and service from the State. Can it be seriously contended that a tax on the Bristol, Tennessee shipment would amount to a discriminatory burden on interstate commerce when the intrastate shipment is thus taxed? It is obvious that, contrary to being discriminated against, if Appellant escapes liability under this tax, it enjoys an advantage over intrastate carriers.

It is true, as Appellant has repeatedly urged, that Section 163 of the Virginia Constitution forbids it to do intrastate business in Virginia. But the Virginia Constitution does not require Appellant to "lease" its equipment for such use by another or to enter into contracts with carriers obligating it to perform intrastate services in Virginia, which it "farms out" to its subsidiary. Apparently the Appellant does not think the Virginia Constitution forbids such actions on its part. For our part, we submit that when the Appellant by contract permits its property to be used intrastate in Virginia for compensation it submits that property to taxation in Virginia, and itself for taxation of the privilege of such

intrastate activities. This phase of the Appellant's activities, it appears to the Commonwealth, brings it squarely within the scope of *Cudahy Packing Co. v. Minnesota, supra*, which is cited with apparent approval even in *Spector*. In *Cudahy* a tax was levied by Minnesota against an Illinois corporation, based on its gross receipts on mileage in Minnesota from a contract with various railroads, under which contract Cudahy supplied refrigerator cars to the railroads for compensation. The property was used by another corporation in both intrastate and interstate commerce. The tax was sustained.

CONCLUSION

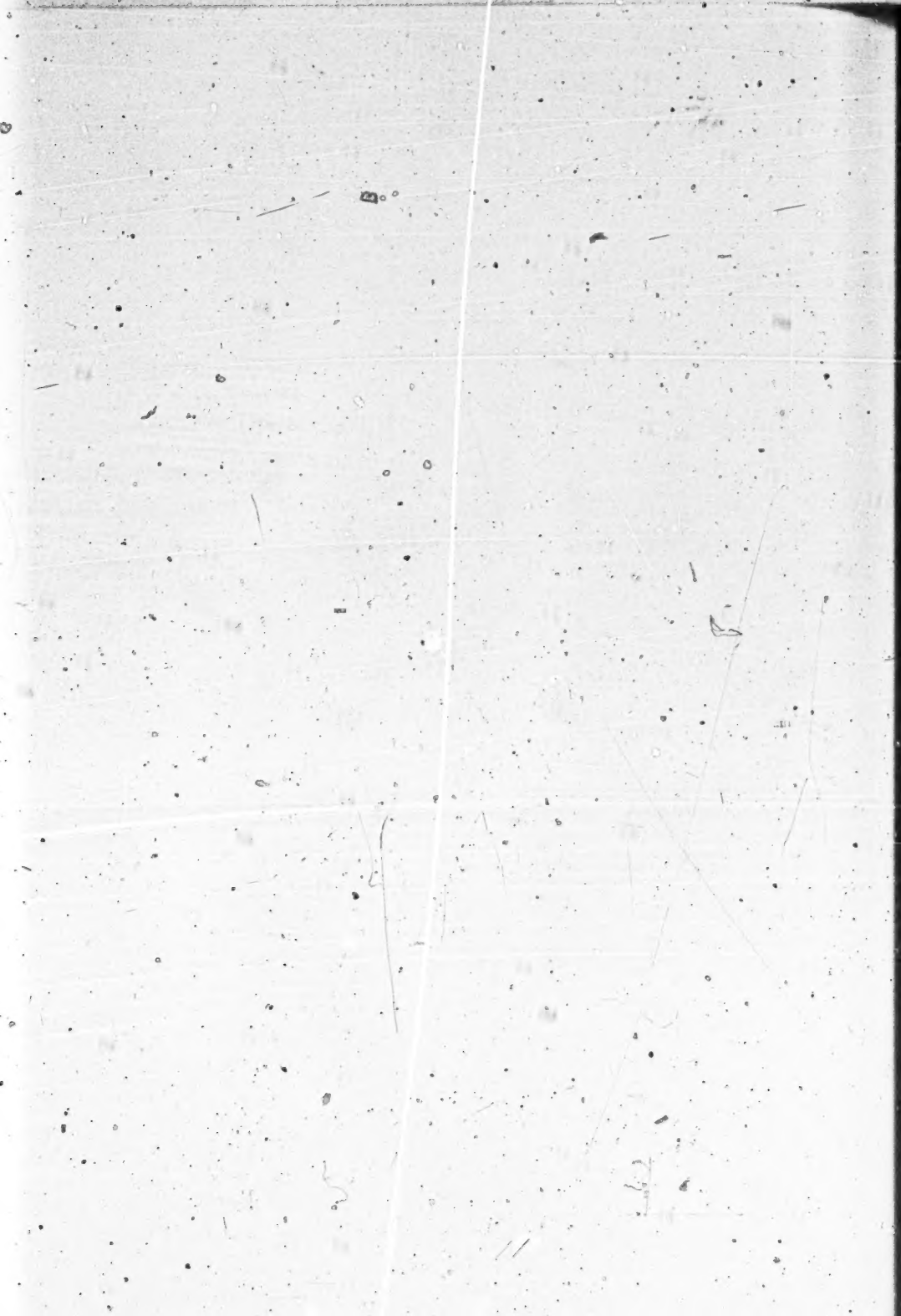
The Constitution of Virginia, the administrative interpretations, judicial decisions, and now the language and admitted intention of General Assembly all indicate that the present tax is a property tax. In operation it appears to be such. It is non-discriminatory, fairly apportioned and has not been shown to be excessive. The activities of the Appellant in Virginia subject it to taxation therein. For these reasons, the Appellee respectfully submits that the judgment appealed from should be affirmed.

Respectfully submitted,

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APPENDIX



Constitution of Virginia

“§ 170. *Income, license and franchise taxes; paving and sewer taxes; abutting land owners.* — The General Assembly may levy a tax on incomes in excess of six hundred dollars per annum; may levy a license tax upon any business which cannot be reached by the ad valorem system; and may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial, or commercial corporation. Whenever a franchise tax shall be imposed upon a corporation doing business, in this State, or whenever all the capital, however invested, of a corporation chartered under the laws of the State, shall be taxed, the shares of stock issued by any such corporation shall not be further taxed. No city or town or county having the right, under this section, to impose taxes or assessments for local improvements upon abutting property owners shall impose any tax or assessment upon abutting landowners for street or other public improvements, except for making and improving the walkways upon then existing streets, and improving and paving then existing alleys, and for either the construction, or for the use of sewers; and the same when imposed, shall not be in excess of the peculiar benefits resulting therefrom to such abutting landowners. Except in cities and towns and counties having a population greater than five hundred inhabitants per square mile as shown by the United States census, no taxes or assessments, for local public improvements, shall be imposed on abutting landowners.